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ABSTRACT

The document is submitted pursuant to a contract with the U.S. Commission on Civil Rights, in preparation for hearings held in New Mexico during November 1972. It covers the protection and preservation of the land and water rights of the American Indian tribes in the Southwest, which is as vital as any problem which now confronts the Pueblo tribes. The discussion: (1) considers the relationship which exists between the Indian tribes and the United States Government, using the Pueblo Tribes as an illustration; (2) traces the development of the legal basis for protection of the tribal rights to use water--the Winter's Doctrine; (3) chronicles legislative and administrative events affecting the Pueblo and neighboring tribes in both New Mexico and Arizona; and (4) interprets those events. (FF)

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THE RIGHT TO REMAIN INDIAN

The Failure of the Federal Government to Protect Indian Land and Water Rights

Submitted to the U. S. Commission on Civil Rights

by

The All Indian Pueblo Council, Inc.
Albuquerque, New Mexico

November 8, 1972

PREFACE

This paper is submitted pursuant to a contract with the U. S. Commission on Civil Rights, in preparation for hearings to be held in New Mexico during November 1972. The protection and preservation of the land and water rights of the Indian tribes in the Southwest is as vital as any problem which now confronts these tribes.

The Pueblo Tribes of New Mexico have depended on the Rio Grande to sustain their lives for thousands of years. To the Pueblo Indian, the Rio Grande is a living part of the balanced scheme of nature, with which the tribes maintain a close relationship. Thus, the river is a part of the very life and existence of the Indian. When the river dies, so does the Indian.

That is why the Pueblo Indians, as well as their brother tribes all over the West, are deeply concerned with the events which have occurred within the past 75 years. Those events limit the availability of water to them and, therefore, threaten their own existence. They realize, as do their brother tribes in Arizona, that they must be aware and active in the protection of those rights

which are paramount to all others.

The discussion which follows: (1) considers the relationship which exists between the Indian Tribes and the United States Government referring to the Pueblo Tribes as an illustration; (2) traces the development of the legal basis for protection of the tribal rights to use water - the Winter's Doctrine; (3) chronicles legislative and administrative events affecting the Pueblo Tribes and neighboring tribes in both New Mexico and Arizona; and, (4) interprets those events.

I. Relationship of the U. S. to the American Indian Tribes.

The subject of the relationship which exists between the Indian tribes and the U. S. Government has been succinctly stated in a memorandum submitted to the Commissioner of Indian Affairs, Bureau of Indian Affairs, by William H. Veeder, Water Conservation Specialist with the Bureau of Indian Affairs. A segment of that memorandum is included here as a discussion of the unique relationship existing between the U. S. Government and the Indian tribes, particularly with the Pueblo tribes of New Mexico.

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Immemorial Rights of the Pueblo Indians - National Obligation to Protect Them.

Long prior to the time that the European culture first invaded their lands and then engulfed them, the Pueblo Indians had created and maintained a high degree of civilization predicated upon their use of the waters of the Rio Grande and its tributaries. Their lives were oriented to the River which made habitation possible in contrast to the harsh desert environment which extended for miles both east and west from their ancient homes.

Spain and Mexico during their sovereignty respected the Pueblo Indians and their property interests, seeking to preserve and protect them. 1/

In 1848 when the National Government under the Treaty of Guadalupe Hidalgo assumed sovereignty over the area occupied by the Pueblo Indians there was established between it and the Indians the constitutional relationship of guardian and wards. 2/ On the subject the Highest Court had this to say:

> "...it is not necessary to dwell specially upon the legal status of this people under either Spanish or Mexican rule, for whether Indian communities within the limits of the United States may be subjected to its guardianship and protection as dependent wards turns upon other considerations.....Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized Nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State." 3/

1/ See Handbook of Federal Indian Law, Cohen, pp. 383 et seq.

2/ United States v. Sandoval, 231 U.S. 28, 46 (1913).

3/ United States v. Sandoval, 231 U.S. 28, 45-46 (1913).

The Court further stated:

> "...it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the Government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease."4/

Fulfillment of that trust obligation is the fundamental feature of this consideration. From the broad spectrum of pronouncements by the Supreme Court it is abundantly manifest that one of the principal aspects of the Nation's trust responsibility in the words of that Court, is the assurance to the Pueblo Indians -- indeed, all Western Indians - that they shall have a

> "...peaceable and unqualified possession of the land in perpetuity."5/

Most cursory knowledge of the Pueblo Indians, their mores and basic concepts of life, reveals that their ancient lands and the means of maintaining them are perhaps foremost in their thinking. Logical sequitur of that fundamental concept of the Pueblo Indians - and very much a part of it - is their insistence that their equally ancient rights to the use of water in the Rio Grande and

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4/ Ibid., 231 U.S. 28, 46 (1913).

5/ United States v. Shoshone Tribe of Indians, 304 U.S. 111, 116 (1937).

its tributaries be protected and preserved. They - perhaps more than any other people - know that the continuation of their homes and abiding places is inextricably interrelated to those rights to the use of water. That the United States has an obligation to preserve those rights is well stated in these terms respecting the Colorado River Indians:

> "...The broad powers of the United States to regulate navigable waters under the Commerce Clause /which gives rise to the trust relationship with the Indians/ and to regulate Government lands under Article IV, Section 3 of the Constitution" invests the Nation with authority "to reserve water rights for its /Indian/ reservations and its property."6/

Keyed to the Nation's trust responsibility are the criteria which govern the fulfillment of it. On the subject it has been stated:

> "The trustee /guardian/ is under a duty to the beneficiary /ward/ in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has greater skill - /here engineers, hydrologists, soil scientists, contract negotiators, administrators, lawyers/- than that of a

6/ Arizona v. California, 373 U.S. 546, 597-598 (1963).

> man of ordinary prudence, he is under a duty to exercise such skill as he has."7/

A concomitant proposition - here most important - is that, The guardian is under a duty to the ward affirmatively "to take and keep control of the trust property."8/ He is, moreover, to the extent of his capacities, here professional, "...under a duty to the beneficiary to use reasonable care and skill to preserve the trust property."9/ It is instructive to turn to the timber blow-down Menominee Case in Wisconsin. There Congress in its consent that the National Government could be sued, declared, among other things:

> "At the trial of said suit the court shall apply as respects the United States the same principles of law as would be applied to an ordinary fiduciary and shall settle and determine the rights thereon both legal and equitable of said Menominee Tribe against the United States notwithstanding lapse of time or statute of limitations."10/

7/ American Law Institute, Restatement, Trusts, Section 174.

8/ Ibid., Section 175.

9/ Ibid., Section 176.

10/ The Menominee Tribe of Indians v. The United States, 101 Ct. Cls. 22, 23 (1944).

From the findings, conclusions and the judgment in the last cited decision it is evident that the broad precepts of the law reviewed above were applied against the United States of America.

In a companion case to that last cited, the court had this to say with respect to the performance of the trust responsibility owing by the United States to the Indians:

> "We further think that the provision of Section 3 of the jurisdictional act concerning the principles applicable to an 'ordinary fiduciary' add little to the settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee."11/

Perhaps the most basic concept of the trust obligation owing by the National Government to the Pueblo Indians is that it must exercise the highest degree of fidelity to them. It has been declared in regard to the loyalty of the guardian to the ward that, "The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary."12/ Recently it has been

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11/ The Menominee Tribe of Indians v. The United States, 101 Ct. Cls. 10, 19 (1944).

12/ American Law Institute, Trusts, Section 170.

authoritatively declared that the United States owed "the most exacting fiduciary standards" with respect to the Indians, even if it should prefer to pursue other interests.[13] Under no circumstances can the United States in furtherance of its other obligations, act in competition with the Indians or in derogation of their rights.[14]

One of the most difficult aspects of this review is the dual responsibility of the United States - (1) its trust responsibility to the Pueblo Indians including, but not limited to, the preservation and protection of their rights to the use of water; (2) the responsibilities in connection with, but not limited to, the development of projects for non-Indian purposes. The conflicts emerging from that dual responsibility will be discussed in some detail.

Gravest threat to the Pueblo Indians and the continuation of their ancient communities is lack of information as to the extent of their reasonable present and future

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13/ Navajo Tribe of Indians v. United States, 364 F. 2d 320, 322 (Ct. Cls. 1966).

14/ American Law Institute, Trusts, Section 170, p. 431 et seq.

demands for water from the Rio Grande. In the absence of that information it is virtually impossible for the United States to fulfill its trust responsibility.

Locale of the Pueblos along the main stream of the Rio Grande demonstrates graphically the problems of the Trustee United States. These Pueblos are traversed by or border upon the Rio Grande: (1) San Juan; (2) Santa Clara; (3) San Ildefonso; (4) Cochito; (5) Santo Domingo; (6) San Felipe; (7) Sandia; and (8) Isleta. These Pueblos are intersected by or traversed by tributary streams. (1) Taos; (2) Picuris; (3) San Juan; (4) Santa Clara; (5) Tesuque; (6) Nambe; (7) Pojoaque; (8) San Ildefonso; (9) Cochiti; (10) Santo Domingo; (11) San Felipe; (12) Santa Ana; (13) Jemez; (14) Zia; (15) Acoma; (16) Laguna; and (17) Isleta. 15/

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The foregoing discussion by Mr. Veeder lays the first premise upon which the action of the trustee, United States, must be judged. The second premise is the legal basis by which that trust responsibility is guided in the protection of Indian water rights. It is that consideration to which we now turn.

15/ Note: There are several undesignated tributary streams traversing the Pueblos. Note also that some of the tributary streams have different names on different maps.

II. Winters Doctrine Rights to Use of Water.

When the tribes began to experience intrusions upon their lands and surrounding areas, they probably did not give thought to whether their right to the use of water was also being infringed upon. The Pueblo tribes in New Mexico had, like certain tribes in Arizona, developed irrigation systems along the Rio Grande and its tributaries and made use of those systems many centuries before the Conquistadores rode into their villages. To the tribes, the river was alive and part of the whole process of nature. Their relationship in that process was one of worship, reverence, and respect for those elements which were provided to sustain life. There were no elaborate concepts of law which guided the tribes in their relationship to one another. Each tribe lived in its own locale, adjusting to the forces of nature as those forces changed from year to year.

The invasion of the Europeans into the home areas of the tribes brought irreversible changes, including definitions of rights based upon foreign concepts of law. As the Western territories were annexed to the

United States, the protection or lack of protection of the laws of the majority culture was imposed upon the tribes. The tribes in these Western territories began to experience settlement upon the lands by hunters, miners, farmers, cattlemen and businessmen. As a result of the settlements, the tribes could not roam and hunt at will upon the lands which they had known as their homes.

During the last half of the 19th Century the settlement of the West became so overpowering that the tribes were forced to reach agreements with the United States to make their homes upon defined, limited areas of land through treaties between the Tribes and the United States. These areas were and are known as reservations.

When the settlers established themselves in the Western territories, the availability and use of water for domestic use and economic growth became a matter of the highest priority. Without a sufficient supply of water, no community could establish itself and grow.

There being vast areas of arid and semi-arid lands in the Western United States, water was in much shorter supply than in the Eastern United States. As the settlement of the West expanded, the law relating to the use of water by non-Indian users grew out of the concept of prior beneficial use, now known as the doctrine of prior appropriation. The main feature of this doctrine is priority of right based upon actual use. It has been defined in these terms: "..... to appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the State where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations." (Arizona v California 283 U.S. 423 (1931)).

The fact that so many settlers were establishing homes and communities near the Indian reservations raised the issue of whether the lands of the tribes

were subject to the doctrine of prior appropriation. The issue was faced squarely and answered in Winters v U.S., 207 U.S. 564 (1908).

The Fort Belknap Indian Reservation in the State of Montana was set up by a treaty in 1888 whereby the tribes granted to the United States certain lands and reserved the lands upon which their reservation was established. The north boundary of the reservation was the center of the Milk River, a tributary of the Missouri River. In 1889 water was diverted from the Milk River to irrigate reservation lands. Subsequently, Winters and other non-Indian defendants built dams and diversions upstream from the reservation which prevented waters of the Milk River from reaching the Indian lands. The non-Indians claimed that they had properly appropriated the water. The Indians obtained an injunction against the non-Indians and on appeal to the Ninth Circuit the injunction was upheld. On appeal to the United States Supreme Court, two basic questions were to be resolved:

1) Were rights to the use of water in the Milk River reserved for the tribal lands, even though the water rights were not mentioned in the Treaties involved?

2) Assuming a reservation of those rights, were they divested when Montana was admitted to the Union?

In answer to the first question, the court stated:

> The lands were arid, and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately accepted by the government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was the cession of the waters, without which they would be valueless, and "civilized communities could not be established thereon." And this, it is further contended, the Indians knew, and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. (emphasis added)

In response to the second question, the court said:

> The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. The United States v The Rio Grande Ditch and Irrigation Company, 174 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through the years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste--took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.16/

In summary, the Winters case makes clear:

1) By the Treaty of 1888, the Indians reserved to themselves the rights to the use of water in the Milk River; even though the Treaty made no mention of those water rights; and
2) The Indian water rights which were reserved under the Treaty were exempt from the laws of a state.

16/ Winters v U.S., 207 U.S. 577 (1908).

That same year the Ninth Circuit was faced with another case, very much like the Winters case, involving the Blackfeet tribe. In Conrad Inv. Co. v. U.S. 161 F. 829 (9th Cir. 1908), non-Indians had obstructed the flow of the Birch Creek which was to be used for the benefit of the Blackfeet Reservation. Reviewing Winters, the Ninth Circuit concluded:

> The present case is in many repects similar to the Winters Case. The act of Congress on May 1, 1888, which ratified an agreement with certain Indians and established the Ft. Belknap Indian reservation, with the middle of the main channel of Milk River for its northern boundary established also the Blackfeet Indian reservation, with the middle of the channel of Birch Creek for its southern and southeastern boundary, and in this case the diversion of the waters of Birch Creek by means of a dam is the subject of controversy, as the diversion of the waters of Milk River by means of a dam was the subject of controversy in the Winters Case. The law of that case is applicable to the present case, and determine the paramount right of the Indians of the Blackfeet Indian reservation to the use of the waters of Birch Creek to the extent reasonably necessary for the purpose of irrigation and stock raising and domestic and other useful purposes. The government has undertaken, by agreement with the Indians on these reservations to promote their improvement, comfort

> and welfare, by aiding them to become more self-supporting as a peaceful and agricultural people. The lands within these reservations are dry and arid, and require the diversions of waters from the streams to make them productive and suitable for agricultural, stock raising, and domestic purposes. What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the government to reserve whatever water of Birch Creek may be reasonably necessary, not only for present uses, but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the Winters Case.
> (emphasis added)(at page 832)

In Arizona v. California, 373 U.S. 546 (1963), the Supreme Court reiterated the principle of the Conrad Investment case and relied upon the Winters case as a firm precedent for the proposition that Indian Reservations were established with the intent that the waters to be reserved should be enough to "make those reservations livable" (at p. 599). The Court sustained the Report of the Special Master and stated at page 600:

> .....we also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisy the future as well as the present needs of the Indian Reservations and ruled that

> enough water was reserved to irrigate all the practically irrigable acreage on the reservations.

The Court in Arizona specified one criteria of determining present and future needs - irrigable acres. This was, however, not set out as the exclusive measure of Indian water rights under the Winters Doctrine.[17/]

In summary, the Winters Doctrine Rights, as developed theough the Winters, the Conrad Investment, and the Arizona cases, stands today as the definitive rule upon which protection of the water rights of the tribes is based. Winters has stated that the Indians could use the water "for agriculture and arts of civilization." Conrad Investment, relying on Winters had held that "..... whatever water ..... may be reasonably necessary, not only for present uses, but for future requirements is clearly within the terms of the treaties as construed by the Supreme Court in the Winters case." And in Arizona, again relying on Winters, the Court stated that the amount of water reserved for Indian use must be sufficient to "satisfy the future as well as the present

17/ William Veeder, "Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development," Joint Economic Committee, Washington, 1969.

needs of the reservations."

Based upon the statements in the foregoing discussion, the Winters Doctrine may be defined thus: Indian tribes residing on reservations have paramount rights to sufficient water with which to meet their present and future economic development requirements. Those rights are not subject to state laws and are paramount to water users who claim their rights under state laws.

It would seem that the United States, acting in its capacity as trustee to the property of the tribes, would find itself on firm ground when faced with the duty of protecting that property, including water rights. But the history of the West and the activities of the government in the development of that vast area raises many questions as to the conflicts of interest which exist within the structure of the trustee. The following section will make a general review of those events.

III. Chronicle of Projects Affecting Tribal Lands and Water Rights.

The rush of settlers to the lands of the West forced Congress to consider legislation which would enable development of the Western United States. It was obvious to those who had traveled and studied the settlements in the grasslands, desert areas and mountain valleys that the primary need was an adequate supply of water.

Reacting to this pressure, Congress established a fund in the Treasury known as the "reclamation fund," to be used in the "examination and survey for, and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semi-arid lands in the said States and Territories...," comprising the entire western United States.[18/]

This Act opened the door for a tremendous flurry of

18/ 32 Stat. 388, 43 U.S.C 391, 411ff

activity to develop reclamation works throughout the West. The Territory of New Mexico was a key area for projects to be developed. Since the Civil War, and particularly after the railroads came to New Mexico Territory in the 1880's, emigration from the East had greatly increased and began to strain the natural resources of the area . Seeing the opportunity to develop the southern farming areas of the Territory of New Mexico, enterprisers formed the Elephant Butte Company to build a dam and irrigation works in Elephant Butte Canyon, 100 miles north of El Paso on the Rio Grande. With the coming of Federal involvement in the field of "reclamation," the government took over the construction of Elephant Butte Reservoir, to impound the flood waters of the Rio Grande for purposes of irrigation.[19/]

In the meantime, Mexico was feeling a noticeable decrease in the flow of the Rio Grande at El Paso.

19/ 33 Stat. 814 (1905)

This was due to the tremendous increase in irrigated lands in southern Colorado and New Mexico Territory, following settlement of those lands. Upon protest by Mexico, investigations transpired from an international committee. The result was a recommendation to build a dam at El Paso to regulate the flow of the river. Reclamation Service came up with the alternative plan of building a dam near the site selected by the old Elephant Butte Company, as mentioned above.

As development of reclamation projects in the West expanded, it became more obvious that the shortage of water was a serious problem for anyone who lived in the arid and semi-arid lands of the west. In a report by the United States Geological Survey in 1915, there appears this ominous conclusion based on the known facts: "The waters of the Rio Grande and its tributaries are already so fully utilized that any increase in development must come chiefly through storage of flood waters." 20/

20/ "Water Resources of the Rio Grande Basin, 1888-1913," U.S. Geological Survey, Washington, Gov't. Printing Office, 1915.

Shortly afterwards, the United States Reclamation Service pursued studies to determine what projects could be instigated in the Middle Rio Grande Basin to improve the water usage system there.[21]

During this same decade, the status of certain Indian lands was being seriously questioned due to a Surpeme Court decision, U.S. v Sandoval, 231 U.S. 28 (1913). That decision recognized the guardian-ward relationship between the U. S. and the Pueblo tribes and placed the title to certain lands which had been purchased from the Pueblo tribes, or otherwise entered and settled upon during the preceding half century, in doubt. For many years prior to the Sandoval decision non-Indians had settled upon lands within the Indian reservations. These settlements were, in some cases, through purchase agreements with the tribes, while in other cases the settlements were made without agreement or approval by the tribes. When the Sandoval decision came down, and it was clear that a non-Indian could not

21/ "Report on Water Supply and Possible Development of Irrigation and Drainage Projects on the Rio Grande Above El Paso, Texas," U.S. Reclamation Service, June, 1919.

settle upon Indian reservation land without approval from the trustee of those lands, the United States, much uncertainty arose as to the validity of the non-Indian settlements on Indian lands. Reacting to the uncertainty raised by the Sandoval decision, Congress established the Pueblo Lands Board to investigate land titles within Pueblo Land Grants Board to investigate land titles within Pueblo Land Grants and set up machinery to quiet title to the Pueblo tribal lands.[22/] The Board was supposed to hear evidence from adverse claimants and make reports on each individual Indian Pueblo, which reports were to be given to the United States Attorney General so that the United States "in its sovereign capacity as guardian of said Pueblo Indians," could file a quiet title suit for the Indian lands. As a part of the investigation, the Board was to make some determination of the water rights of the parcels

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22/ 43 Stat. 636 (1924)

of land involved. By 1933, the Board had concluded its investigation and made findings which determined who had title to the lands in dispute. As a result of these determinations, some Indians and some non-Indians had to move from the lands in question. These parties were compensated for their "loss" and Congress appropriated funds for this purpose.[23/]

The reports from the Board were not consistent in the amounts of water rights granted to the parcels of land involved. In some instances there are no specific amounts allocated and in other instances certain parcels of land are entirely overlooked. Thus, the matter of Pueblo tribal water rights was made more confused.

While the United States was determining who owned what lands and what water rights in the Pueblo Lands Boards actions, the work of reclaiming arid lands and

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23/ 48 Stat. 109.

developing flood control and irrigation works proceeded at a rapid pace. Throughout the West, conservancy districts were being formed under the State laws, designed to increase irrigation and control of the flow and quality of the waters from stream within state boundaries. In New Mexico, the Middle Rio Grande Conservancy District was created in 1925, as a political subdivision of the State of New Mexico, to plan, construct and operate a coordinated, modern irrigation and flood control project. Within the exterior boundaries of the District were included six Pueblo tribes. Subsequently, Congress authorized the Secretary of Interior to execute an agreement... with the Middle Rio Grande Conservance District ... providing for conservation, irrigation, drainage, and flood control for the Pueblo Indian lands situated within the exterior boundaries of the said Middle Rio Grande Conservancy District...[24/]

The Agreement, entered into on December 14, 1928,

24/ 45 Stat. 312 (1928)

provided for, in part, construction of "necessary works ...that will result in material, permanent and beneficial improvements and actually divert and carry the water to the acreage of Indian lands of the several Pueblos approximating 23,607 acres and especially so that the new system will carry and deliver to all areas of Indian lands now irrigated and adequate water supply without cost to the Indians other than as herein provided."

The "several Pueblos" referred to were: Cochiti, Santo Domingo, San Felipe, Santa Ana, Sandia, and Isleta.

Of particular importance to the tribes was the manner in which their water rights were recognized by the Agreement.

Clause Number 20 of the Agreement states:

> ...The cultivated area of the Pueblo Indian lands approximating 8,346 acres, has water rights for such area that are not subject to the laws of the state of New Mexico, and are prior and paramount to any rights of the District or any property holder therein, such water rights being for irrigation, domestic and stock purposes. The said

> District hereby recognizes these water rights now appurtenant to the said area of irrigated Pueblo Indian lands owned individually or as pueblos, and for domestic and stock purposes of the Indians as prior and paramount to any rights of the District or of any property holder therein; that in regard to the newly reclaimed Pueblo Indian lands the said District hereby agrees, recognizes and grants a proper share of water sufficient to adequately and properly irrigate the newly reclaimed Pueblo Indian lands, as for like District lands, and further agrees that the District shall not discriminate in the division and use of water for such newly reclaimed Pueblo Indian lands, and that such water rights for the newly reclaimed lands, as well as for the now irrigated Pueblo lands, are not and shall not be subject to any laws relating to loss by reason of non-use or abandonment thereof so long as title to said lands shall remain in the Indians individually or as Pueblos or in the United States. (emphasis added)

The"newly reclaimed" lands to which the agreement refers were lands that heretofore had not been cultivated on the Pueblo reservations. The agreement created two categories of lands within the reservations--cultivated lands and newly reclaimed lands. The cultivated lands were recognized for their prior and paramount rights to water. In contrast, the newly reclaimed lands approxi-

mating 15,261 other acres were treated differently. Even though they were Indian reservation lands, bearing Winters Doctrine Rights identical to those of the old cultivated lands, such lands were only recognized and "granted" a share of water on the same basis as the non-Indian lands within the Middle Rio Grande Conservancy District. By not recognizing that the 15,261 acres of newly reclaimed lands had prior and paramount rights the same as the 8,346 acres of old cultivated lands, the Agreement resulted in a gross derogation of Indian rights.

The interest of the Pueblo tribes in the Rio Grande Compact, which was to come in the next year, was obvious. As parties to the Middle Rio Grande Conservancy District, they were directly affected by the Rio Grande Compact controversies, studies, compromises and finally, the approval of the Compact by Congress in 1939.[25/]

As the Rio Grande Compact was being worked out,

25/ 53 Stat. 785.

massive studies were being conducted on the major river systems of the West, including the Colorado River and the Rio Grande. In 1937, a report of the National Resources Committee revealed detailed studies of possible water usages and division pertaining to both the Colorado River Basin, transporting water from the San Juan River across the continental divide to the Chama River on the Rio Grande Basin. The full report detailed a large number of supplemental projects to develop the Middle Rio Grande basin.[26/]

The plans for the Middle Rio Grande Basin were by no means isolated operations in the whole scheme of the Department of Interior's Southwest operations. A larger river system than the Rio Grande, the Colorado River was also being recognized for its importance in future development of the Southwestern region. In 1921, the seven states directly affected by the Colorado

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26/ "Part VI - Rio Grande Joint Investigation on the Upper Rio Grande Basin," National Resources Committee, Government Printing Office, 1938.

River, Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, gained the approval of Congress to enter into a compact providing for "an equitable division and apportionment among said states of the water supply of the Colorado River and of the streams tributary thereto..."[27] A year later, the seven states signed a compact which stated among its major purposes, "to establish the relative importance of different beneficial uses of water, and secure the expeditious agricultural and industrial development of the Colorado River Basin."[28] Article VII of the Colorado River Compact states that "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes."[29]

27/ 42 Stat. 171.

28/ 70 Cong. Rec. 324 (1928)

29/ Ibid. p. 325.

In 1928, approval of the Colorado River Compact was given by Congress, stating that all users and appropriators of the water in the Colorado River would be subject to and controlled by the Compact.[30/] The 1928 Act not only approved the Compact, but gave the green light to the burgeoning water policies of the Secretary of Interior by authorizing the Boulder Canyon Project in Arizona. This project was to be a key event in dividing the water on the main stream of the Colorado River between the Upper and Lower River Basins. Supposedly, it protected the Upper Basin against unlimited development beyond the allocated water for the State of California. The States of California and Arizona and Nevada subsequently were unable to agree on a division of the Lower Basin water, which eventually led to the suit filed by Arizona against California in 1952 (See Appendix B map.)

In 1929, Congress consented to compacts or agreements between the States of Colorado and New Mexico respecting

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30/ 45 Stat. 1057, 1062, 43 USC 617.

division and apportionment of the waters of the Rio Grande, San Juan and Las Animas Rivers, and compacts among New Mexico, Texas and Oklahoma respecting the Rio Grande, Pecos and Red Rivers.[31] All meetings, consultations and discussions pursuant to these compacts would include a representative of the Department of the Interior, trustee to the tribal interests.

By February, 1929, New Mexico, Colorado, and Texas had entered into a temporary Compact, providing that a condition of "status quo" should be maintained on the Rio Grande and that a permanent Compact would be concluded by June 1, 1935. As in the Colorado River Compact, this temporary agreement stated that nothing in the compact should be construed as "affecting the obligations of the United States of America to the United States of Mexico, or to the Indian tribes, or as impairing the rights of the Indian tribes."[32]

31/ 45 Stat. 1502.

32/ 46 Stat. 767, 772.

During this same period, much controversy arose among the states, particularly between New Mexico and Texas, concerning the use of the water of the Rio Grande in the Middle Rio Grande area. Unable to reach agreement with the State of New Mexico, and particularly the Middle Rio Grande Conservancy District, the State of Texas filed suit to enjoin the program of the Middle Rio Grande Conservancy District. This led to a compromise and subsequent completion of the Rio Grande Compact, signed on March 18, 1938, ratified by the States of Colorado, New Mexico and Texas and consented to by Congress in 1939.[33/] The compromise only lasted until after World War II when Texas filed suit alleging depletion of water by the Middle Rio Grande Conservancy District use.

World events which followed postponed plans for reclamation projects suggested in the thirties, but plans for the post-war period were being made. In 1944, the

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33/ 53 Stat. 785.

Bureau of Reclamation, along with the State of Arizona, began investigations for water utilization in central Arizona. That same year, in a Treaty between the United States of America and the United Mexican States, the Mexican government was guaranteed the right to receive a specified amount of water annually from the Rio Grande and Colorado Rivers.[34/] This Treaty has had to be considered in each subsequent plan to use water from the two rivers.

Another significant wartime event relating to the use of Southwestern Water was the authorization by Congress to place navigation and flood control projects under the Chief of Engineers, War Department, now known as the Corp of Engineers.[35/]

34/ 59 Stat. 1219 (1945).

35/ 58 Stat. 887 (1944) 33 U.S. C. 701a.

Until this time, flood control projects were under the Bureau of Reclamation. This Act also set the stage for vigorous postwar prosecution of projects in the planning stage. The authority of the Chief of Engineers was later extended to construct and operate public park and recreational areas in reservoir projects under the War Department.[36/]

An investigation made by the Bureau of Reclamation which began in 1944 produced an extensive scheme known as the Central Arizona Project (CAP).[37/] The plan was described as follows:

> ...Operation of the project would include introduction of the Colorado River water to the Salt River area, the diversion of water from the Salt River area to the middle Gila River area, and the regulation and conservation of water in the middle and upper Gila River areas and along the San Pedro River to allow for increased diversions.

About the same time that the Central Arizona Project Plan was revealed, interested government agencies released

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36/ 60 Stat. 641, 33 U.S.C 701 A ff.

37/ U.S. Dept of Interior, Report on Feasibility, Bridge Canyon Route, Central Arizona Project, Project Planning Report No. 3-8b.4-1, February, 1947.

Comprehensive plans for Water Resources Development in the Rio Grande and Colorado River Basin. These plans completed the work started fifteen years earlier and projected future developments,[38] which were approved, as in accord with an agreement between the Secretary of Army and Secretary of Interior, by Congress in the Flood Control Act of 1948.[39]

In the Rio Grande Basin, the Middle Rio Grande Project for flood control was authorized by the 1948 Act. Among the components of the project were (1) a channel and flood way program, (2) Chamita Reservoir, (3) a flood control and sediment reservoir on the Jemez River (located within the boundaries of Santa Ana Pueblo), and (4) plans to purchase the El Vado Dam and Reservoir. The latter was done pursuant to an agreement between the United States and the Middle Rio Grande Conservancy District that the United States would construct the Middle Rio Grande Project, including work

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38/ Comprehensive Plan for Water Resources Development, Rio Grande Basin, Report by the Dept. of Interior Project Planning Report No. 5-15.0-1, May, 1946.

39/ 62 Stat. 1171 (1948).

on the El Vado Dam, and operate and maintain the District works during construction. Thereafter, the United States would appoint the District as its agent for operation and maintenance. All of this, of course, directly affected the six Pueblo tribes involved in the Middle Rio Grande Conservancy District.

Following this massive legislative effort, implementation of the projects proceeded pursuant to subsequent Congressional acts over the next quarter of a century. Among the most signficant developments to occur were the following:

Colorado River Storage Project - Consists of twenty-four participating projects, including the San Juan-Chama Project, designed to supply the Middle Rio Grande Basin municipal and agricultural interests.[40] The construction of this particular project was authorized by Congress in 1962.[41] This authorization

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40/ 70 Stat. 105 (1956)

41/ 76 Stat. 102 (1962) (San Juan Chama) 43 U.S.C 620a.

to build the transmountain diversion system effectuates a method of diverting water from the Colorado River system to the Rio Grande.

The San Juan-Chama Project directly limits the flow of water downstream on the San Juan River, affecting the Jicarilla Apache Tribe, and the Navajo Tribe because it diverts water from the San Juan River into the Rio Grande Water System in new Mexico. (See Appendix B.) It also directly affects the tribes on the Rio Grande because it introduces foreign water into that river system causing difficulties in determining water users rights in that stream system.

Cochiti Legislation[42/] - The Cochiti Reservoir, was to be constructed on the Rio Grande, at the Cochiti Reservation, for "flood control." However, a special provision in the Act anticipated the upcoming San Juan-Chama diversion project, with importation of that water to be used, in part, to supply water for recreation pools in the flood control projects. Note Section e: "Provided that the water required to fill and maintain such pools is obtained from sources entirely outside the drainage basin of the Rio Grande."

42/ 74 Stat. 480 (1960) Cochiti.

Federal Water Project Recreation Act of 1965[43] - This legislation encouraged the development of recreation areas at or around the reservoirs constructed pursuant to other purposes. In effect, it opens the door to land development schemes connected with the new recreation areas. This directly affects Indian lands because numerous reservoirs have been constructed adjacent to or located on Indian reservations. In New Mexico, Cochiti Dam, Jemez Dam (on the Santa Ana reservation), Navajo Dam, in Northwestern New Mexico (near the Navajo reservation) are examples.

Colorado River Basin Project[44] - This set in motion much of the Pacific Southwest Water Plan proposals which had been packaged in 1964. Included in this legislation was the huge Central Arizona Project (CAP). The CAP, with its extensive diversions, would affect the flow of the Colorado River downstream from the diversions. Among the tribes affected are Ft. Mohave

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43/ 79 Stat. 213 (1965)

44/ 82 Stat. 885 (1968) (CAP Act) 43 U.S.C. 1501

Tribe, Colorado River Tribes, Ft. Yuma Tribe, Chemehuevi Tribe, and the Cocopah Tribe.

IV. The Performance of the Trustee, United States, in the Protection of Tribal Lands and Water Rights.

The Act of June 17, 1902, setting up the reclamation bureau within the Department of Interior, marked the beginning of a series of events which would invade and conflict with the interests of the Indian tribes all over the United States. The first reclamation project in New Mexico, the Rio Grande Project, itself defined the basic conflict involved with every subsequent reclamation project - providing water for the incoming developers who anticipated the growth of the area through emigration, as opposed to protecting those prior and paramount rights which had been established before New Mexico was a part of the United States. Those prior rights which were unquestionably established are those of the Indian tribes.

By the time the Winters case set the foundation for the protection of Indian water rights, there was already widespread recognition that not enough water in the Rio Grande Basin existed to satisfy all those who wanted to use it. Yet the only attempt made to protect the tribes Winters Doctrine Rights was a document filed by the

Indian Service in 1911 entitled "Declaration of Water Rights" on behalf of seventeen of the eighteen Pueblo tribes in New Mexico. The report listed 19,014 acres for which water rights were claimed. Taos Pueblo was not included.[45/]

While plans were being made to develop the Middle Rio Grande Valley and increase the population and use of the land through agriculture, there did not appear any definitive effort to classify and inventory the land and water needs of the tribes. Rather, the Trustee, United States, proceeded to make a haphazard effort to quiet title to Indian and non-Indian lands and water rights through the Pueblo Lands Board, leaving a confused situation for the tribes.

The agreement to include Pueblo tribes of the Middle Rio Grande Valley in the Middle Rio Grande Conservancy District served only to limit the water rights of the tribes involved. In the agreement an estimated 23,607 acres of Pueblo Indian lands was cited as being irrigable and embraced within the district lands. Of these Indian

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45/ Report of Special Master, Texas v. New Mexico, Supreme Court of the U.S., October term, 1953, p. 31.

lands 8,346 acres were stated to be cultivated at that time (1928) and were recognized to have prior and paramount rights to the use of water above all other lands in the District. But the remaining 15,261 so-called newly reclaimed acres, even though Indian lands entitled to Winters Doctrine Rights identical to those of the 8,346 acres, were treated the same as the non-Indian District lands.

By not giving the lands their proper recognition and assuring their Winters Doctrine Rights in the agreement, the Trustee for the tribes contracted away a significant part of the tribes water rights respecting these approximated 15,261 acres.

Continuing the gross violation of its trust responsibility, the United States participated in the negotiations which culminated in the Colorado River and Rio Grande Compacts without taking active measures to protect the rights of the tribes involved other than a statement that "nothing in this compact shall be construed as affecting the obligations of the United States to Indian tribes."

It is not contended that the United States has violated its trust responsibility by building projects

or approving water control agreements per se. It is recognized that a reclamation or flood control project could conceivably be of great benefit to the Indian tribes. The point is that while the United States uttered statements indicating that it was under obligation to the tribes, it took no active measures to assure that the water rights of the Indian tribes were, in fact, being protected.

In the face of continued evidence of the limited supply of water in the Rio Grande and Colorado River the Trustee continued its policy of "looking the other way." When Colorado, New Mexico and Texas agreed in the Rio Grande Compact to allocate the waters of the Rio Grande to their respective states it appeared that the water supply for the Indian tribes might be limited by that Compact. The Trustee acknowledged the danger while making no demand that the Indian rights be protected. Observe this statement by the U.S. Indian Service District Counsel in a memorandum to the Director of Irrigation of the Indian Service in 1939:

> The only reason we are concerned about whether The Compact may work to the disadvantage of New Mexico is that we believe that the Indian interests must be satisfied, if they are to be satisfied at all, out of the allocation to New Mexico, and if New Mexico should later find that it had made a mistake and will not get the water which it thought it would get we are of the opinion that the Indians will be the ones to feel the blow first if the Compact is ratified unconditionally by Congress. (emphasis added)

In the same memorandum, it was recommended that the "newly reclaimed lands" of the Pueblo tribes in the Middle Rio Grande Conservancy District maintain their status of being recognized on the same basis as non-Indian lands.

As seen in the historical survey of this paper, by the time World War II interrupted domestic schemes in this country, elaborate plans to manipulate the short water supply in the West had already been drawn up. After the tide of the war turned in favor of the Allies, the drawing boards were once again busied, refining the plans spelled out in the 1930's.

While the Department of Interior was implementing the 1948 legislation, visitors to the desert states

could see definite population patterns taking shape. In the Upper Colorado River area Denver was obviously the star of the Rocky Mountain states. Huge mineral discoveries in the San Juan area promised a growth in the settlement of the Four Corners area. In the lower Colorado River Basin, prospects of massive land development in southern California and southern Arizona were bound to make huge demands upon the river system.

On the east side of the Continental Divide, the Middle Rio Grande Valley was one logical recipient of post-war emmigrants. Albuquerque, located at a strategic crossroads, had already tripled its population since 1940. Easy access to that city and the beautiful climate were natural advertisement for speculators. In the lower Rio Grande Valley, the El Paso area became a local point of military activity, including the White Sands Military Reservation just to the north.

By 1960, the dreams of those who foresaw and planned for the growth in these areas were well on their way to fulfillment. As predicted, the major growth areas mentioned had doubled their populations.

Of primary concern in this paper is the question: What was being done to protect the prior and paramount water interests of the tribes. As noted above, prior to the war, the Trustee, United States, had overseen a fragmented, confused policy that has, in at least one instance, resulted in an outright give-away of a significant part of the Indian water rights of the six Middle Rio Grande Pueblos through the Middle Rio Grande Conservancy District agreement.

The United States had pursued rapid expansion of the reclamation projects, serving the interests of those who could foresee the expansion of the West and the rewards for those who had water available.

That this would also be the policy in the post-war period appears clearly from the reports justifying the legislation in the period after 1946. Witness to this statement is a report of the President's Water Resources Policy Commission in 1950.[46/] The report

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46/ "River Program Policy Considerations -- The Rio Grande", The Committee on River Program Analysis No. II, The President's Water Resources Policy Commission, October 10, 1950.

is quite candid in its discussion of the desires of the non-Indian interests in the Rio Grande Valley. At page 5, note this statement:

> Scarcity of water is a limiting factor for any kind of economic expansion in this area. The flow of the Rio Grande and its tributaries and known ground water supplies are fully appropriated and no water is available to allow for expansion of irrigation nor for substantial increase in municipal or industrial use. Growing municipalities can obtain sufficient water only at the expense of the nearby irrigated areas on whose continued existence the economic welfare of many of the urban centers now depends. (emphasis added)

Again, to emphasize the shortage, on page 18:

> All presently developed water has been appropriated and, in some cases, over-appropriated, and water use for any purpose can be expanded only at the expense of some other beneficial use.

This is a theme which, we noted, was first expressed in 1915. It was obvious that, in order for the area to grow in population and expand in all economic areas, water was the basic need. But, if there was not enough water for everyone to prosper, someone would lose. We should remember, as noted earlier in this paper, the

Indian tribes had and still do possess prior and paramount rights to the use of water. Did it follow, then, that their rights would be protected in spite of the force of growth from the non-Indian interest? The answer is no.

The most crucial witness to this is found in the litigation Texas v. New Mexico instituted in 1952. Texas, feeling a loss of water in the Rio Grande, sued New Mexico to limit the use by New Mexico of Rio Grande water. This related particularly to the Middle Rio Grande Conservancy District. Texas argued that the United States was an indispensible party since it was charged with protecting private Indian rights and public property rights in the National lands in New Mexico. If the United States had entered the case, it would have had to protect Indian rights to water. The case was finally dismissed because the United States, Trustee for the Indian tribes, would not allow itself to be a party to the suit.[47/] It was obvious that if Winters Doctrine Rights of the Indian tribes were enforced in New Mexico, there would not be enough water left for the development of large non-Indian interests.

47/ 352 U.S. 991(1957).

A recent event which affects the New Mexico and Arizona tribes was the passage of legislation in 1962, which gave birth to an idea spawned thirty years earlier.[48] The San Juan-Chama Reclamation Project culminated at least thirty years of planning.

This ambitious project, referred to several times in this paper, will be used to help non-Indian interests in total disregard of the prior and paramount rights of the Indian tribes on both the Colorado River and Rio Grande systems. The implication of this legislation will be examined next.

1) The legislative history of the Act explains that the San Juan-Chama diversion would enable New Mexico to use a major portion of the waters of the Upper Colorado Basin to which it is "entitled" under the Colorado River and Upper Colorado River Basin Compacts.[49] The plan is for the imported water from the San Juan river to be used to provide 110,000 acre feet extra to be used in the following manner:[50]

48/ 76 Stat. 102, 43 U.S.C. 620a.

49/ U.S. Code, Congressional and Administrative News, 87th Congress, 2nd Session, pp. 1681-1701.

50/ "Inventory of Potential Users of Unallocated Water", San Juan-Chama Project, Bureau of Reclamation, Nov. 1968.

- 27,700 acre feet annually to replace depletion of the Rio Grande water supply caused by the Pojoaque, Llano, Taos and Cerro tributary units.
- 20,900 acre feet annually to be used in the Middle Rio Grande Conservancy District.
- 5,000 acre feet annually to the Cochiti Reservoir.
- 48,200 acre feet annually to the City of Albuquerque.
- 8,400 acre feet will evaporate in the reservoirs.

The Legislative History also states that "recreation and preservation and propagation of fish and wild-life" are other purposes of the project.

In a discussion of the need for this project, the Legislative History expounds on a theme we have seen reiterated time and again since the beginning of this century - shortage of water. This time the statement is stronger than ever. Note the following excerpt:

> The water needs of the Rio Grande Basin far exceed the amounts of water available, either in the basin or for diversion from the San Juan Basin... The economic plight of the small communities in tributary streams (includes Pueblo tribes) in the northern part of the Rio Grande Basin has long been recognized as a major problem of the State... Farther south along the Rio Grande the available water supply is over-commited and there is a critical need for supplemental water in order to stabilize the agricultural economy... The need for municipal and industrial water...is even more critical than the need for irrigation water. Albuquerque is one of the fastest growing cities in the United States... An assured water supply is essential...for the anticipated growth of Albuquerque.

In spite of conflicting testimony as to the availability of water in the Colorado River, the Committee's majority report [51] concluded that there was enough water available from the Colorado River to fulfill the San Juan-Chama Project and the Navajo irrigation Project.[52]

51/ U.S. Code, op. cit., p. 1688.

52/ The Navajo Irrigation Project, a companion project, anticipates a large diversion from the San Juan system to meet demands of the Four Corners Area. While the primary purpose of the Navajo Project is irrigation, the report notes: "The project is adapted to serve municipal and industrial water users as well as...irrigation. The officials of the State of New Mexico anticipate a relatively large municipal and industrial water demand will develop in the San Juan River Basin."

The San Juan-Chama project, if allowed to be implemented, would direct from the San Juan basin a large amount of water which would be necessary for the future development of the Jicarilla Apache and the Navajo tribal lands and economy. The tribes on the lower Colorado River are also interested parties since the waters diverted from the San Juan Basin would affect the downstream water flow and threaten their supply.

If the water diverted from the San Juan basin is introduced into the Rio Grande, the Pueblo tribes face more extreme problems of claiming enough water for their present and future needs. Without there being a determination of their rights to the use of water before implementation of such projects as the San Juan-Chama future attempts to claim water over and above their present uses would face obstacles which could be impossible to overcome.

We must also remember that at the time this Act was passed, Arizona v. California[53/] had not been decided. The Arizona case was to make significant decisions about allocations under the Colorado River Compacts. Thus, major policy decisions about the use of the water were being made while litigation to determine the rights of water

53/ 373 U.S. 546 (1963).

users was still in progress. In addition, a definite determination of water needs of Indian tribal lands had never been made and no plans to do so were in the offing. The picture has become more incredible in regard to the Trustee's lack of action in the fact of impending plans and projects that directly affect the ability of the tribes to lay claim to their rights under the Winters Doctrine.

2) The incredulous nature of this inaction is well demonstrated by the posture which the Trustee has taken for the tribes in recent litigation involving the Pueblo Tribes.

In 1966, the State of New Mexico instituted one of five suits in the United States District Court of New Mexico, against the United States, four Pueblo Tribes and hundreds more, for determination of the water rights of the defendants in the "Nambe-Pojoaque River System," a tributary of the Rio Grande. This was one of five similar suits filed. The purpose of the suit was to facilitate the administration of the San Juan-Chama reclamation project which was under construction at the time this suit was instituted. The New Mexico complaint alleged that the users of the water in the "Nambe-Pojoaque River System." including the Pueblo tribes, used the water under New Mexico appropriation law. The State Engineer, it was alleged, made hydrographic surveys of the stream. The complaint asked that the court define and determine the water rights of each of the defendants.

The United States filed a motion to dismiss the action for lack of jurisdiction and then entered a motion to intervene in the suits. In the complaint to intervene the United States claimed immemorial rights to the use of water for the Pueblo Tribes and

that the tribes were entitled to use enough water to "satisfy the maximum needs and purposes of said Pueblos."

But in a Pre-trial Memorandum, the United States claimed, as an alternative theory, rights for the Pueblo tribes under historically irrigated lands based on appropriation and beneficial use. This alternative theory would place the water rights of the Pueblo Tribes on the same basis as the water rights of the non-Indian users of the Nambe-Pojoaque River and the tribes would have no water rights which would allow them claims for future use. If this alternative theory were allowed to be the basis for the Pueblo Indian water claims then there would be no way that the Indian tribes could grow as viable communities.

We have seen, in an earlier section of this paper, that Indian rights to the use of water have been protected and recognized through the development of the Winters Doctrine, on the basis of present and future needs. When the trustee is charged with protecting the

interest of the beneficiary, the Trustee should be a relentless advocate for the protection of the rights of the beneficiary.

The fact that the Trustee, United States, would even allow consideration of historically irrigated acres based on appropriation use as a theory to protect the rights of the Pueblo Tribes is an indication that the Trustee, United States, is not executing its full and unqualified effort to protect Pueblo tribal interests.

As a result of the filing by the United States of the Motion to Intervene, the parties were "realigned" to place the United States and the four Pueblo tribes as plaintiffs. The original suit thus proceeded on the basis of two separate complaints which seem unrelated.

In conjuction with the New Mexico complaint the State Engineer prepared a survey showing all irrigated lands within the Nambe-Pojoaque watershed. On the basis of the survey the State proceeded to make "Offers of Judgment" to hundreds of non-Indian defendants. If the

Offers were accepted by the defendants, agreements were signed and an Order issued by the U.S. District Court granting water rights to the parcels of land involved.

While these Offers of Judgment were being made, the United States did not ask that the non-Indian defendants prove their land title and rights to use of water. Even though the non-Indians may have had those rights, the failure of the United States, as Trustee, to examine the non-Indian defendants may mean an abandonment of Indian rights.

Several months later two Pueblo Tribes, downstream from the four tribes abovementioned, filed a Petition to Intervene in the five suits already instituted on the grounds that their rights were not being protected by the United States in regard to the Initial suits, since those suits affected waters from the upstream tributaries that fed the mainstream of the Rio Grande which, in turn, traversed their lands.

The United States responded that the two downstream tribes have no valid interest in the suits. Since that time, in 1970, the United States has continued to oppose the intervention of the two tribes.

In the light of the legal actions taken by all parties involved, we must step back and remember the interests of the parties involved.

The State of New Mexico. Has significant responsibility, as agent for the United States, in accounting for the water flows of the San Juan-Chama project and the delivery of water from that project to the recipients as listed above.

The Non-Indian defendants. Owners of land in the river areas who took title to land and water through transfers both under the Pueblo Land Board action of the 1920's and otherwise.

The Pueblo Tribes involved. All of these tribes, whether named or not named in the lawsuit, have Winters Doctrine Rights which must be protected by the Trustee, United States.

The United States. As a named party, the United States has interest in National Park lands to protect. These parks are in the same watershed areas as the tribal lands, thus placing the United States in a position of representing interests which are adverse to the tribal interests. Thus, the Trustee, United States, is again faced with a conflict of interest, between protecting its own public interests and protecting private rights of the tribes, here competing for the same water.

We must again note that in spite of assurances from the Bureau of Indian Affairs,[54/] a serious, comprehensive study and determination of the land and water needs of the Pueblo Tribes has not been made.

The United States, as Trustee for the Indian tribes, is under a duty of assert and protect the land and water rights of the tribes. Water is the basic, most important resource for survival and growth

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54/ Remarks by Commissioner Bruce, February 21, 1970, at Santo Domingo Pueblo, New Mexico.

in the arid and semi-arid lands in the West. It follows that if the Indian tribes are to survive and grow then the United States should exert its full effort to protect the land and water rights of the tribes.

The United States Government has made many pious utterances about the protection of tribal land and water interests. Yet, through the years, Indian tribes have witnessed a steady deterioration of their land and water resources, both in quantity and in quality. They have seen the United States Government give its overt approval to assure the success of special interest groups which are taking away the very resources upon which the existence of the tribes depends. In spite of numerous statements and admissions through the years to the effect that future growth by non-Indian interests could be accomplished only by bypassing the protection of Indian water rights, the United States refrained from giving that protection.

While recognizing on the one hand that the Indian tribes were wards of the government and that their land

and water rights were to be protected, the Government developed huge schemes to develop resources and use water for large non-Indian schemes to develop resources and use water for large non-Indian schemes, without first making a comprehensive, meaningful determination of the extent of the tribal land and water rights. Without this determination, there can be no real protection and guarantee of the land and water rights of the tribes.

And until the Government can give its unqualified commitment to the protection of Indian rights then the tribes can only expect that their cultures will be completely destroyed.

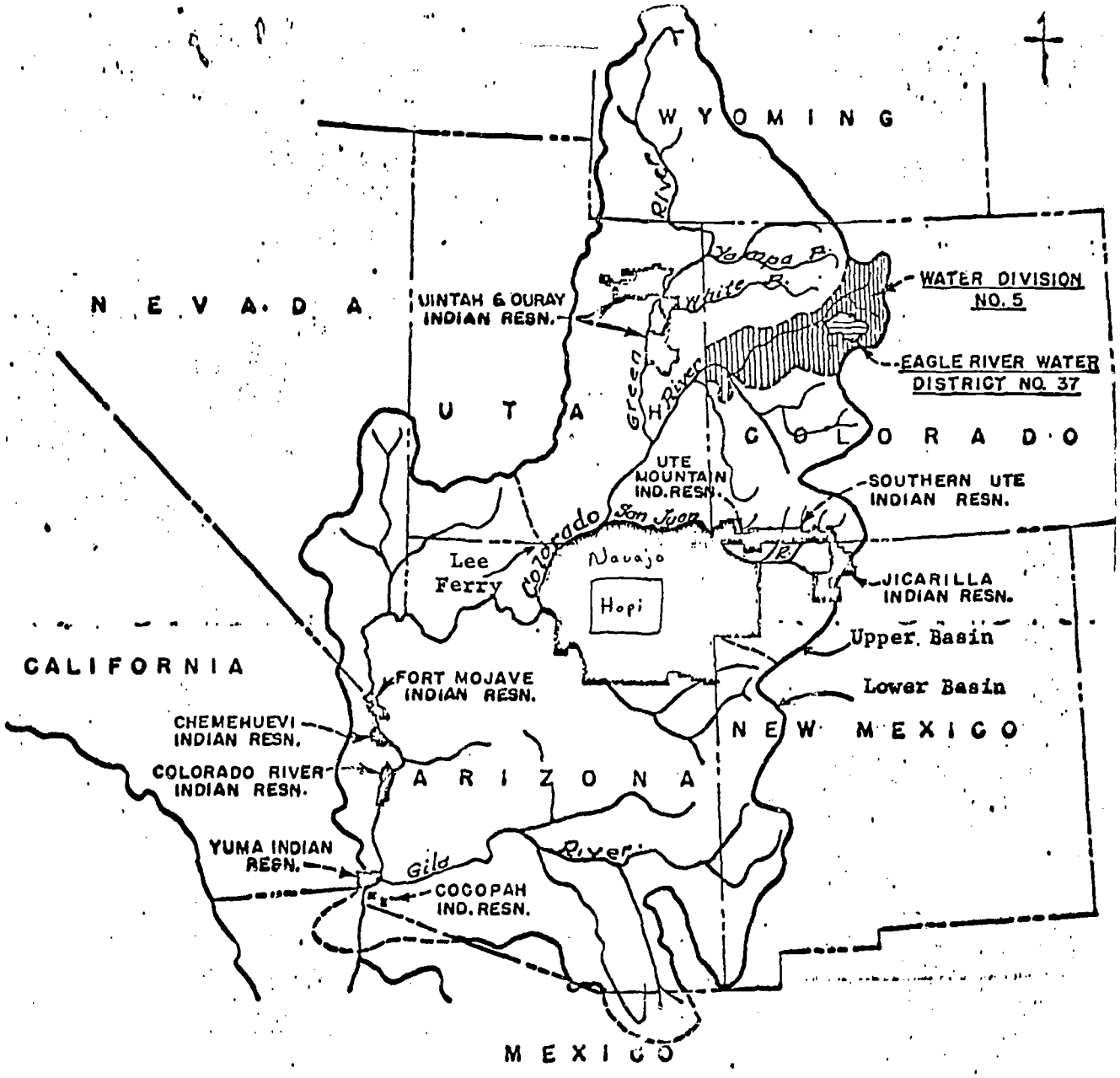
CONCLUSIONS

1. The Trustee, United States, has breached its trust responsibility to all Indian tribes, including the tribes of New Mexico and Arizona, and will continue to breach that duty until the United States government is honest enough to change its policy.
2. The Trustee, United States, through its principal agents, Department of Interior and Department of Justice, is caught in a deplorable conflict of interest. The Department of Interior, on the one hand, is charged with responsibility of fulfilling the trust duty to Indian tribes, through the Bureau of Indian Affairs, while on the other hand, it promulgates Bureau of Reclamation projects designed to develop non-Indian interests which invade Indian water interest.

The Department of Justice, is also caught in a conflict of interest. While charged with advocating Indian interests on the one hand, it is often found advocating non-Indian, competing interests in

the same suit. As President Nixon stated, "No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute."

3. As a result of this immoral state of affairs, the basic civil right is being grossly violated - Indian tribes are being denied an economical base upon which to build their lives. Without protection of their Winters Doctrine Rights, there is no base upon which they can develop a viable, continuing experience. It is, as one honest human being put it, "the denial of the right to remain Indian."



Map of The

COLORADO RIVER BASIN

ARIZONA V. CALIFORNIA 373 US 602

AND INDIAN RESERVATIONS ON THE MAIN STEM OF THE COLORADO RIVER, THE GREEN RIVER AND THE SAN JUAN RIVER AND THEIR TRIBUTARIES.

BUREAU OF INDIAN AFFAIRS
PHOENIX AREA OFFICE
J.M. JONES MAR. 14, 1971

PLATE I

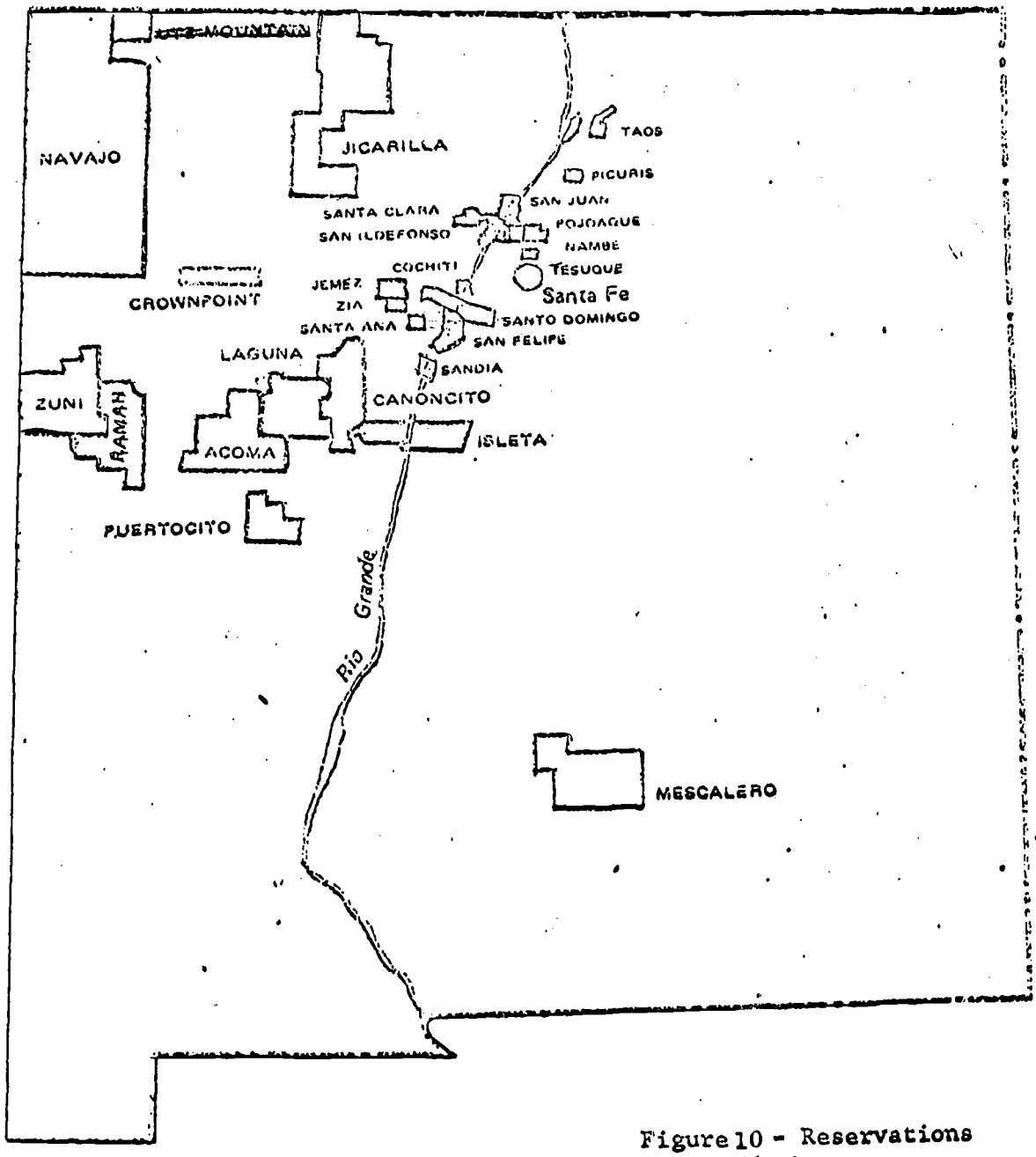


Figure 10 - Reservations in New Mexico

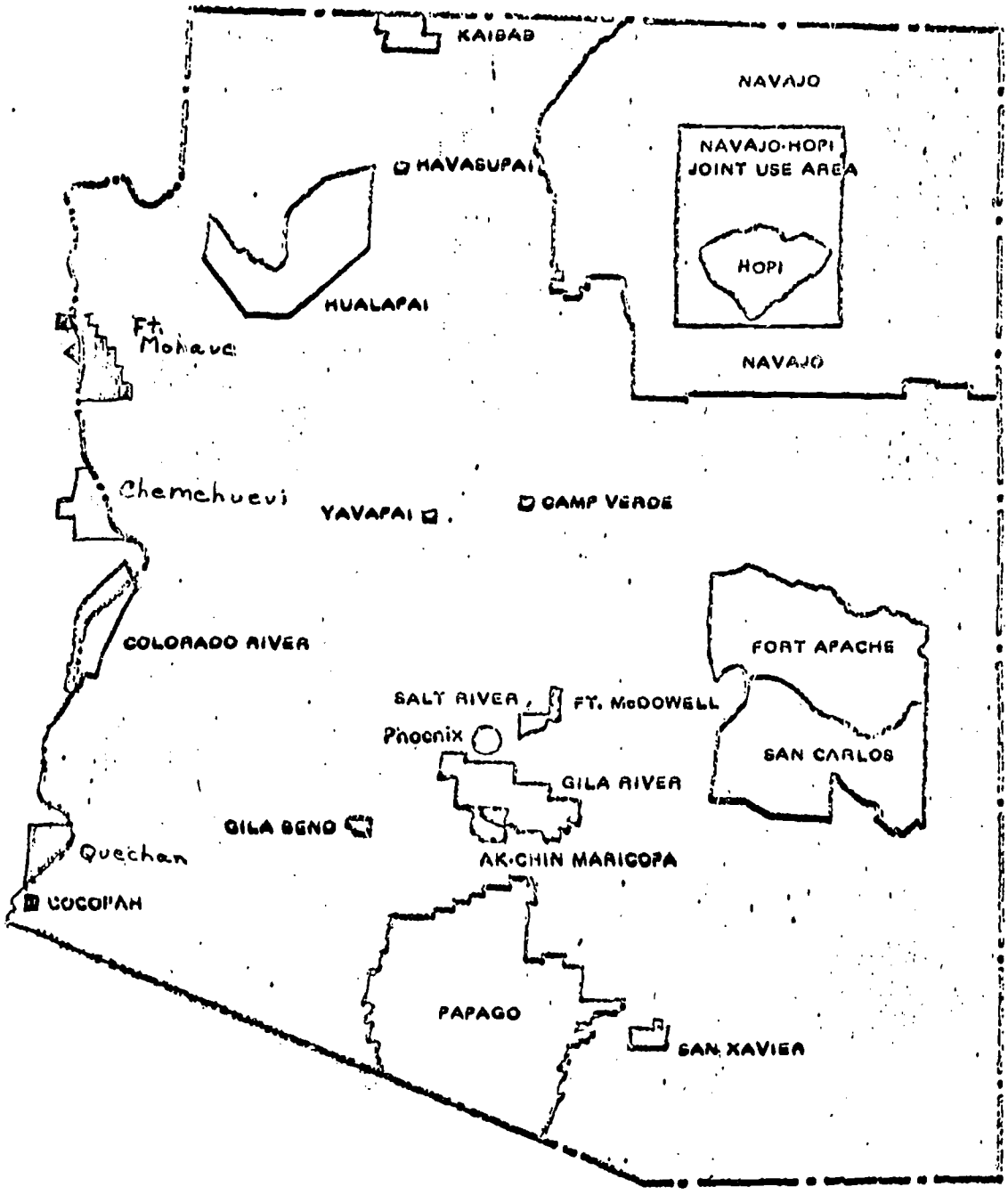


Figure 11- Reservations in Arizona

GPO 941-689